SUBJECT INDEX

TABLE OF AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1969

NO. 595

LOUIS S. NELSON, Warden,
SAN QUENTIN PRISON,
Petitioner,

vs.

JOHN EDWARD GEORGE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

ARGUMENT

I. The Writ of Certiorari Was Not Improvidently Granted.

In his brief Respondent states (pp. 1-2) that the petitioner "has no personal stake in the ultimate outcome of this litigation," and, for that reason, the writ was improvidently granted. However, while we may agree that petitioner has no interest in defending a North Carolina conviction, that is a fact which only serves to emphasize the erroneous nature of the decision below and not that the writ was improvidently granted.

The Court below has held that petitioner is the proper party respondent to defend the North Carolina conviction. Since California officials accordingly must appear in court and take whatever appropriate action is necessary, petitioner's interest in maintaining this action is clear. This writ, therefore, ought not to be dismissed as having been improvidently granted.

II. It Has Not Been Claimed That Respondent George Filed His Petition in the Wrong Court Because the Holding in Peyton v. Rowe, 391 U.S. 54 (1968), Should Not be Extended to This Case, and, in Any Event, Under Prevailing Case Law There Would Be No Other Forum Available Now to Resolve Respondent's Claims.

The respondent George correctly states that we have not claimed that his petition for writ of habeas corpus was filed in the wrong court (Respondent's Brief, page 2, n.1, App. 1-3). Thus, we have not urged that George should have filed his petition in North Carolina (the district of sentencing) as *Word* v. *State of North Carolina*, 406 F.2d 352 (4th Cir. 1969), would permit rather than in California (the district of confinement) as the Ninth Circuit in the decision below has required.

We have not urged this view first, because the holding in *Peyton* v. *Rowe*, 391 U.S. 54 (1968), should not be extended to apply to this case, and, second, because this Court's decision in *Ahrens* v. *Clark*, 335 U.S. 188 (1948), has been interpreted by the majority of lower courts as holding that a petition for writ of habeas corpus must be filed, if at all, in the district of confinement. The Third Circuit's decision in *United States ex rel. Van Scoten* v. *Pennsylvania*, 404 F.2d 767 (3rd Cir. 1968), and the authority cited there is to this effect. Similarly, the Ninth Circuit in *Ashley* v. *State of Washington*, 394 F.2d 125 (9th

Cir. 1968), previously had held that a Florida prisoner could not seek habeas corpus relief in a district court located in the State of Washington to challenge a Washington detainer.

Word v. *State of North Carolina, supra,* holds to the contrary, but it is fortuitous that both this case and *Word* should involve unserved sentences imposed by the State of North Carolina. Accordingly, until this Court holds that the lower courts have misconstrued the application of *Ahrens* v. *Clark* this petition could not have been filed in most other district courts.

In any event, it has consistently been our position that the court below erred in deciding each of the questions presented by this case. It erroneously extended the holding in *Peyton* v. *Rowe, supra,* to permit George to attack his North Carolina sentence now, and it erroneously decided that the California warden was the appropriate party respondent to defend that conviction in a California district court. Even if this court were now to hold, as respondent urges, that George may now challenge his North Carolina sentence, it would still be our view that the California warden is not a proper party respondent and that the court below incorrectly decided the forum question. Indeed, if this Court should agree that George may challenge his North Carolina sentence now, then it should also decide that the appropriate forum in which to bring this action is in the district of sentencing. As we shall discuss more fully *infra* (10-11, 13-14), that result would be more consistent with the legislative intent that has been expressed to date. However, it is our basic position that respondent is not "in custody" under the North Carolina judgment and that it is not desirable to extend the holding in *Peyton* v. *Rowe, supra,* to a case of this kind. It is our view that an extension of

Peyton v. *Rowe, supra,* is not required by the Constitution which states only that the "writ of habeas corpus shall not be suspended . . ., (Art. I, sec. 9(2); nor by 28 U.S.C. 2241(c)(3) (1964), which implements the constitutional command by providing that [t]he writ . . . shall not extend to a prisoner unless . . . [h]e is in custody . . ."; nor by the holding in *Peyton* v. *Rowe, supra,* itself. We reply to these points.

III. Respondent George Is Not "In Custody" Under the North Carolina Sentence.

Respondent George is not "in custody" under the North Carolina sentence. Thus, we do not take the view as respondent George apparently does (Respondent's Brief, pp. 4-5) that because California permitted him to stand trial in North Carolina under the Agreement on Detainers, he is now "in custody" under the North Carolina judgment within the meaning of 28 United States Code § 2241, *et seq.* George is no more in custody now under the North Carolina judgment than he was before he was tried and convicted there, or, if the North Carolina sentence had been imposed at a time when he was an escapee or a parolee from California custody. Similarly, he is no more in custody now under the North Carolina sentence than if North Carolina were not a party to the Agreement on Detainers and temporary custody had been sought and obtained by executive agreement followed by extradition. The sentence now being served is that of California and the North Carolina sentence is not a cause for an additional or increased period of confinement.

The various theories employed to establish a finding of custody do not establish that fact. Thus, in holding habeas corpus relief to be presently available, the Court below

adopted an "agency" theory, stating that the California warden was an "agent of the North Carolina warden, as evidenced by the detainer" (A. 60). However, the California warden has not assumed any further custodial obligations because of the North Carolina sentence. He is restraining George solely because of the California conviction and is not an "agent" for North Carolina. A brief comparison with some other types of agreements should also serve to put that theory to rest. Thus, for example, under the Western Interstate Corrections Compact to which California is a party state (Cal. Pen Code § 11190, et seq.), California, when designated as a receiving state, accepts custody of persons convicted in other states, even though a California conviction is not involved. Similar agreements sometimes are reached with respect to federal prisoners and individually with states not parties to the Western Interstate Corrections Compact. In those cases, it may be noted, it is the contractual practice for the sending party to agree to defend legal proceedings involving the prisoner.

Desmond v. *United States Board of Parole*, 397 F.2d 386 (1st Cir. 1968), *cert. denied* 393 U.S. 919 (1968), is also cited by the respondent (Brief, p. 4). There, a state prisoner was permitted to file a motion to vacate a federal sentence under 28 U.S.C. § 2255. That section requires the moving party to be "in custody" under a federal sentence.[1]

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1. 28 U.S.C. § 2255 provides in pertinent part that:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence."

In *Desmond*, the factual circumstances were that a state prisoner was to resume service upon the federal sentence from which he previously had been paroled. However, in holding the principles of *Peyton* v. *Rowe*, *supra*, to be applicable to the case of resumed incarceration, the court, in *Desmond*, did not directly address itself to the question of custody. Indeed, what it did say points to a different conclusion. Thus, the Court stated, inter alia, that:

> "In Peyton v. Rowe, 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed.2d 426 (5/20/68), the Court held that a defendant while serving the first of two consecutive sentences could attack the second. It does not seem to us a significant stretch to say that he may attack a federal sentence, yet to be served, while defendant is in custody completing a state sentence. The same principles which dictated Peyton v. Rowe seem to us to support jurisdiction here. To be sure, defendant is not physically 'in custody under sentence of a court established by Act of Congress', but if custody is to be construed as single and continuous, we may join the courts as well." 397 F.2d at 389.

However, in an effort to join "the courts as well" the court did not discuss the particular problems which might be involved in the interstate case.

The respondent George also points to the decision in *Word* wherein reference is made to the effect which a detainer might have upon a parole or as a factor in precluding a lower level of custody. He also quotes that portion of the *Word* court's decision to the effect that the detainer constitutes a cause for a dual commitment at the termination of present custody. (Respondent's Brief, pp. 5-6).

However, for a number of reasons the effect, if any, of a detainer cannot be said to establish "custody" in order

to challenge the North Carolina sentence. Thus, the effect, if any, which one jurisdiction may give to the filing of a detainer by another, is a matter of comity and policy which rests solely within the discretion of the confining jurisdiction. As a result, the effect of any detainer may vary from state to state.

Thus, whatever the showing in *Word*, it appears that the effect of any detainer upon the parole decision varies from state to state.[2] In California, a detainer based upon an unserved sentence might result in an earlier release date than would otherwise be the case (A. 37).

Similarly, while the detainer in *Word* apparently precluded a lower level of custody, a detainer in California is only one of several factors considered in determining eligibility for minimum custody. Moreover, even in those cases where a detainer is considered a potential bar, it may be that for other reasons the nature of the inmate's confinement is unaffected by the detainer.

In this connection this Court's decision in *Wales* v. *Whitney*, 114 U.S. 564 (1885) is pertinent. There, court-martial charges were preferred against a naval medical officer who was stationed in Washington, D. C. The Secretary of the Navy placed the officer under arrest and ordered him to remain within the limits of the city until his trial should take place. This Court held that habeas corpus was not available to him, stating that:

> ". . . as Medical Director, he was residing in Washington and performing there the duties of his office. It is beyond dispute that the Secretary of the Navy

2. *Sentencing*, The Decision As To Type, Length, and Conditions of Sentence, by Robert O. Dawson (The Report of the American Bar Foundation's Survey of the Administration of Criminal Justice in the United States), (1969) pages 283-287.

had the right to direct him to reside in the city in performance of these duties. If he had been somewhere else the Secretary could have ordered him to Washington as Medical Director, and, in order to leave Washington lawfully, he would have to obtain leave of absence. He must, in such case, remain here until otherwise ordered or permitted. It is not easy to see how he is under any restraint of his personal liberty by the order of arrest, which he was not under before." 114 U.S. at 569-570.

Furthermore, were the Court to hold that the mere possibility of increased restraint constituted custody, it is difficult to see why this rationale would not extend to a prisoner who is serving an admittedly valid sentence, but who seeks to attack an earlier conviction which resulted in a sentence that he has already served.

The present effect of a detainer upon confinement, of course, presents a new theory of custody, for this Court in *Peyton* v. *Rowe, supra,* was concerned only with the effect of the future sentence upon the duration of the prisoner's confinement. However, in our view, this theory is not relevant in determining whether there is "custody" under the North Carolina sentence challenged. Indeed, we do not believe that respondent's interest in challenging his North Carolina conviction now would be any less if North Carolina were to remove their detainer tomorrow. The validity of any detainer system may raise legal questions, and any prisoner might wish to challenge the level of custody at which he is kept. But as yet, there is no constitutional right to one level of custody over another, or a constitutional right to be free of a detainer. Thus, any questions raised with regard to a detainer upon confinement pertain solely to the internal management of a prison system and not custody, and, at the very least, should be addressed to the state courts in the first instance.

Similarly, the dual commitment theory advanced by the Court in *Word* cannot be said to establish "custody." As even those commentators seeking to extend the holding in *Peyton* v. *Rowe, supra*, recognize, this is a "legal fiction" which is contrary to fact.[2] Furthermore, this theory ignores the fact that if North Carolina were not a party to the Interstate Agreement on Detainers (or if George were not a prisoner), custody of George would have to be obtained by way of extradition. As respondent recognizes, in extradition habeas corpus, review is limited (Brief, p.7). This theory, however, permits a kind of review in the case of a detainer which is precluded in the case of extradition. *Sweeney* v. *Woodall*, 344 U.S. 86 (1952).

In reviewing these various theories of custody, therefore, it seems clear the courts below have attempted unduly to stretch the concept of custody in an effort to implement the underlying policy reason for the decision in *Peyton* v. *Rowe, supra*. That policy is that it is desirable to litigate constitutional claims as early as possible.

However, while that policy is a desirable one, it does not establish "custody." Furthermore, there is a point at which it is not desirable to permit that one policy to override all others. That point has been reached in this case.

Thus, as we noted in our opening brief, it may be the case that the respondent George will never serve his North Carolina sentence. In such a case an extension of *Peyton* v. *Rowe, supra*, would result in an unnecessary utilization of judicial resources. While that result can be justified in the intrastate case where, for all practical purposes (in-

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2. See, the comment, "The Custody Requirement and Territorial Jurisdiction in Federal Habeas Corpus: *Word* v. *North Carolina*," 118 University of Pennsylvania 629, 635-636 (1970).

cluding parole eligibility), sentences are treated as one, that same justification may not be given in the case where convictions are imposed by separate jurisdictions.

Furthermore, in order to decide a case of this kind, it cannot be ignored that the costs incurred will frequently be considerable, regardless of the forum chosen. This, of course, would be particularly true if an evidentiary hearing is held at which the prisoner's presence is required. In stating this as a fact to be considered, we are not attempting to put a "price tag" on constitutional rights, as respondent George asserts (Brief, p.8). We are only stating that in an attempt to mark the boundaries of habeas corpus relief, whoever is required to pay those expenses—whether the state or federal government—could reasonably question whether such expenses are justified when the prisoner is located in another jurisdiction serving a sentence for another crime committed there.

In any event, should the holding in *Peyton* v. *Rowe*, *supra*, be extended, the practical problems inherent in determining an appropriate choice of forum also must be considered. These problems, too, militate against extending *Peyton* v. *Rowe*, *supra*. In this connection, it should be made clear that the choice made by the Ninth Circuit in the decision below was totally wrong. Thus, as we pointed out in our opening brief, the obligation imposed upon the California officials to defend this action is unrealistic for they have no interest in defending the conviction and no assurance that an appropriate North Carolina official will appear in cooperation with their efforts. The proper party respondent must be an appropriate party respondent.

Furthermore, the decision reached by the Ninth Circuit presents a solution which Congress earlier rejected when it enacted Title 28, United States Code section 2255. There,

in providing a remedy in the sentencing court rather than in the district of confinement, Congress rejected a solution which would require federal records, counsel, and when necessary, witnesses to be transported across the country. *United States* v. *Hayman*, 342 U.S. 205 (1952). A similar rejection was implicit in the enactment of Title 28, United States Code section 2241(d) dealing with petitions filed in those states having more than one district court.

Neither fairness to the state (whether California or North Carolina) nor fairness to the respondent George is achieved by hearing his claims in California. Both parties must necessarily depend upon records and witnesses located across the country in North Carolina. Furthermore, while reasons of comity or other available remedies might insure the presence of state witnesses or prisoners (*cf.* *Barber* v. *Page*, 390 U.S. 719 (1968), the availability of other witnesses is not at all clear. For example, the Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings, by its terms, appears limited to criminal proceedings. Cal. Pen. Code § 1334 et seq. *Cf.* Rule 4(f) and Rule 45 of the Federal Rules of Civil Procedure.

Even if the claims raised by this petition could be resolved "upon the papers" the result reached in the decision below is untenable. Assuming, *arguendo*, the ready availability of North Carolina records to aid the court, or even the availability of North Carolina counsel, a California judge may not be familiar with the criminal procedure of another state or the possibile ramifications that that procedure might have in deciding matters of constitutional rights. If California counsel were chosen to aid the petitioner, by definition he is removed from the "scene of the facts" and unfamiliar with North Carolina procedures. While we recognize that it is a resolution of

constitutional rights with which we are here concerned, resolution of these rights may frequently turn on the procedural framework in which they are raised. Often as simple a matter as locating records depends upon a first-hand knowledge of courts and personnel.

The decision below also represents most realistically the worst fears of Congress which it expressed in 1867 when it adopted the language of Title 28, United States Code section 2241 limiting the issuance of the writ to the territorial confines of the district court. As set forth in *Ahrens* v. *Clark*, *supra*, the Congress adopted this limitation because it feared that a judge in Florida might call up before him a prisoner convicted and sentenced in Vermont. This was one reason for the court's decision in *Ahrens* v. *Clark*, *supra*, yet this is precisely the effect which the decision below has since it means that a California judge will now call before him men tried and convicted in other states.

On the other hand, while this effect is not presented by the decision in *Word* to the extent it permits the filing of the petition in the district of sentencing, that decision also presents difficulties as respondent himself admits (Brief, App. 1-3). These difficulties, which constituted a second basis for the decision in *Ahrens* v. *Clark*, *supra*, cannot be minimized. Thus, as the court stated in *Ahrens* v. Clark,

> "It would take compelling reasons to conclude that Congress contemplated the production of prisoners from remote sections, perhaps thousands of miles from the District Court that issued the writ. The opportunities for escape afforded by travel, the cost of transportation, the administrative burden of such an undertaking negate such a purpose. These are matters of policy which counsel us to construe the jurisdictional

provision of the statute in the conventional sense, even though in some situations return of the prisoner to the court where he was tried and convicted might seem to offer some advantages." 335 U.S. at 191.

Accordingly, while it cannot be said that the decision in *Word* is a realization of the fears of Congress that a Florida judge would review a Vermont conviction, it does present the same practical problems outlined in *Ahrens* v. *Clark*, *supra*. These are practical problems which are inherent in compelling a choice of forum,[4] and militate against an extension of *Peyton* v. *Rowe*.

IV. Any Extension of the Holding in Peyton v. Rowe, Supra, Ought to Await Congressional Action or Interstate Agreement. If Not, Then the District of Sentencing Is the Appropriate Forum in Which to Bring an Action of This Kind.

For the reasons stated above, the holding in *Peyton* v. *Rowe*, *supra*, ought not to be extended to provide for habeas corpus relief in the multi-state case. That course is not a desirable one, at least until the Congress has given specific approval. While it might be desirable to provide some form of post-conviction relief in order to permit a prisoner to challenge an unserved sentence imposed by another state, the kind of relief provided should be enacted by the Congress, or by the states through an interstate compact similar to the Agreement on Detainers. *Cf.* ABA Standards

4. In reaching its decision the court in *Word* relied upon a number of cases in which habeas corpus relief was sought in this country by petitioners located outside the United States. We refer, for example, to *Hirota* v. *MacArthur*, 338 U.S. 197, 202 (1948); *Toth* v. *Quarles*, 350 U.S. 11, 13 (1955); *Burns* v. *Wilson*, 346 U.S. 137 (1953); and *Day* v. *Wilson*, 247 F.2d 60 (D.C. Cir. 1957). However, we do not believe that these decisions are relevant, or even exceptions to the holding in *Ahrens* v. *Clark*. Those cases do not deal with a choice of forum as did *Ahrens* v. *Clark*, nor with a possible delay in remedy which is involved here. Rather, those cases deal with the problem which is presented when there might not be any habeas corpus relief available at any time.

Relating to Post-Conviction Remedies (Approved Draft, 1968) Commentary to § 23, pages 44-45.

However, should this Court decide that habeas corpus relief must be made available now to prisoners waiting to serve future sentences in another state, then the district of sentencing is the appropriate forum in which to determine the merits of the claims made. To that extent the decision in *Word* is correct. Resolution of claims in the district of sentencing is more consistent with Congressional policy enunciated to date, while the decision below has been rejected by the Congress whenever considered (see, *supra,* 10-11).

It is true, of course, that Congress has not yet found it necessary to consider in what forum, if any, relief should be sought in a case of this kind. This is because it has been the view until recently that habeas corpus relief is not available to prisoners located in one state seeking to challenge an unserved sentence imposed by another. However, should the Court now decide that there is such a right, the remedy provided should at least be consistent with that Congressional policy which has been expressed to date in analogous situations. That policy is that, where post-conviction relief must be made available, the appropriate forum lies in the district of sentencing. The alternative permitted by *Word* that the district of confinement may be "infrequently preferable" (*Word* v. *North Carolina*, *supra* at 355), raises the same problems as the decision below. In addition, it provides a potential for forum shopping. For these reasons, too, this alternative should be rejected.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the decision of the Court of Appeal be reversed.

DATED: March 20, 1970

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